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Supreme Court, U.S.
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No. 00-530

IN THE

Supreme Court of the United States

BECTON DICKINSON AND COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Not only does the government's opposition brief fall short of rebutting Petitioner's demonstration of the need for this Court's review of the Third Circuit's decision, it supports certiorari in several key respects. For example:

- The government admits that "[t]he distinction between jurisdictional and procedural bars . . . is immaterial to this case", one of the petition's central arguments (Opp. 10);
- The government does not dispute that, if allowed to stand, the Third Circuit's decision jeopardizes the statutory restitution rights of crime victims;
- The government does not dispute that Congress's clear intention is that crime victims be made whole, particularly before the government enjoys any benefit from the criminal activity;
- The government does not dispute that, in amending I.R.C. § 6511 after *Brockamp* to allow equitable tolling, Congress expressed its intention that equitable tolling be applicable to I.R.C. § 6532(c);
- The government does not argue that § 6532(c) contains "detailed" or "technical" language, which was a key factor in this Court's determination in *United States v. Brockamp,* 519 U.S. 347 (1997), that § 6511 cannot be equitably tolled.

The government's opposition does not overcome the petition's demonstration that the Third Circuit's decision was incorrect and, if allowed to stand, will frustrate congressional intent to secure the restitution rights afforded to crime victims by statute. This Court's review is needed to address the grossly inequitable result of the decision.

1. Reversal of the Third Circuit's decision undermining a crime victim's statutory restitution rights is important not just to Petitioner but to society at large.

The government never disputes Petitioner's argument that the Third Circuit's decision places the statutory restitution rights of crime victims at risk. Its response to this point, a simple comment on the merits of Petitioner's underlying argument, is irrelevant to the issue (and the merits of Petitioner's underlying argument are not before the Court).[1]

What is important is that, if allowed to stand, the Third Circuit's decision will subvert Congress's intention that crime victims be made whole, particularly before the government benefits from the crime.[2] Without this Court's review, the damage to a crime victim's restitution rights will be extreme and irreparable. The government's brief does not dispute this point.

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1. The government's reliance upon the holding in *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984) is misplaced. *Florence* held that restitution orders are not "civil judgments" for purposes of the Seventh Amendment (which protects the right to a jury trial in civil cases involving more than $20). *Florence* does not bear any relevance to the relationship between an order of restitution and a federal tax lien.

2. The government misconstrues Petitioner's reference to the Mandatory Victims Restitution Act of 1996 ("MVRA"). Petitioner cites to these provisions solely to demonstrate that Congress's intention that crime victims be made whole continues to be as strong as, if not stronger than, past intent. The government's brief never addresses either Congress's present or its prior expressions of this intent. *See* Pet. 9-12.

2. The circuits are in conflict as to whether § 6532(c) can be equitably tolled.

The government's contention that there is no split in the circuits is incorrect. In *Capital Tracing, Inc. v. United States,* 63 F.3d 859 (1995), and *Supermail Cargo, Inc. v. United States,* 68 F.3d 1204 (1995), the Ninth Circuit held that § 6532(c) is subject to equitable tolling. These decisions remain good law, *Brockamp* notwithstanding, and the government does not contend otherwise.

Capital Tracing and *Supermail Cargo* are premised upon a broad application of the rebuttable presumption in favor of equitable tolling espoused in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990). The Ninth Circuit continues to give broad application to the *Irwin* rebuttable presumption. *See Cedars-Sinai Med. Ctr. v. Shalala,* 125 F.3d 765 (1997).[3]

The government's contention that, in light of *Brockamp,* the Ninth Circuit would disavow the *Capital Tracing* and *Supermail Cargo* holding is speculation without foundation. The Ninth Circuit's own district courts continue to give expansive application to the *Irwin* doctrine. *See, e.g., Aloe Vera of Am., Inc. v. United States,* No. 99-1794-PHX-ROS, 2000 WL 1607317 (D. Ariz. 2000) (citing to *Cedars-Sinai* for the proposition that *Irwin* should be applied expansively). Other courts since *Brockamp* also have determined that § 6532(c) can be equitably tolled. *See Gothenburg State Bank & Trust Co. v. United States*, No. 7:98CV5026, 1999 WL 314928 (D. Neb. 1999); *cf. LaBonte v. United States,* No. 00-2156, __ F.3d __, 2000 WL 1790012 (7th Cir. Dec. 7,

3. Petitioner does not argue (and has never argued) that the Third Circuit's decision directly conflicts with *Cedars-Sinai*, contrary to the government's misguided contention (Opp. 10).

2000) (Seventh Circuit considers merits of equitable estoppel claim relative to § 6532(c) rather than accepting Third Circuit's holding in this matter); *Flight Attendants Against UAL Offset v. Comm'r of Internal Revenue*, 165 F.3d 572, 577 (7th Cir. 1999) (noting *Brockamp* "carved an exception" to *Irwin* for tax refund suits and declining to interpret *Brockamp* as covering the entire tax code).

There remains a split in the circuits as to whether § 6532(c) can be equitably tolled. Given the importance of the issue, this Court should resolve the disagreement.

3. The government's opposition admits that the Third Circuit's reliance upon the "jurisdictional" nature of § 6532(c) as the basis for holding that the statute cannot be equitably tolled was erroneous.

On page 10 of its opposition brief, the government states "The distinction between jurisdictional and procedural bars, however, is immaterial to this case." This is Petitioner's precise argument.

The Third Circuit erroneously concluded that, simply because § 6532(c) is "jurisdictional", the rebuttable presumption in favor of equitable tolling set forth in *Irwin* violates principles of sovereign immunity and thus is inapplicable. *See Becton Dickinson v. Wolckenhauer*, 215 F.3d 340, 349-50. To determine whether the rebuttable presumption in favor of equitable tolling holds, the Third Circuit was required to examine Congress's intent through consideration of Congress's expressed intent (the amendment of § 6511) and the factors discussed in *Brockamp*. The Third Circuit, however, did not consider the amendment of § 6511 and did not seriously apply the *Brockamp* factors to § 6532(c). *See* Pet. 18-25 for a discussion of what Petitioner respectfully submits is a more appropriate analysis of the issue.

4. The government's position that Congress did not intend for § 6532(c) to be subject to equitable tolling lacks legal and factual support.

The government does not dispute that the key consideration in determining whether § 6532(c) can be equitably tolled is Congress's intent. Nevertheless, it ignores the only overt statement of congressional intent on the issue — the amendment of § 6511 after *Brockamp* to add a provision allowing for equitable tolling. *See* Pet. 18-20.

The conclusions the government draws from its analysis of the *Brockamp* factors are not reasonable and are without legal support. The government does not contend that § 6532(c) is either "detailed" or "technical", key considerations in *Brockamp*. 519 U.S. at 350. Instead, it simply repeats the Third Circuit's erroneous conclusion that the phrase "No suit or proceeding . . . shall be begun" demonstrates an intention that equitable tolling not apply. The government ignores that, in *Irwin,* this Court specifically rejected such an argument. *See* Pet. 22, quoting *Irwin*, 498 U.S. at 94-95.

The government incorrectly states the holding of *United States v. Beggerly*, 524 U.S. 38 (1998), when it contends that the brief extension of the limitations period provided by § 6532(c)(2) indicates that Congress did not intend for equitable tolling to apply. In *Beggerly*, this Court held that equitable tolling was not applicable to the limitations period at issue there because the relevant statute already took into consideration equitable concerns. *See* Pet. 17. The provision allowing a brief extension of § 6532(c)'s limitations period applies regardless of the facts of the claim and cannot be considered to account for equitable considerations (and the government does not so argue).

The government's reference to 28 U.S.C. § 6503(f) is inapposite. Opp. 7-8. This statute extends the time for the government to collect a tax from a taxpayer when a third party has challenged a levy as wrongful. The effect of this statute is to allow the government additional time to pursue collection should it be determined that a seized asset was levied upon wrongfully. Section 6503, which exists for the government's benefit, has no application to the rights of a third party contesting a levy and has no relevance to Petitioner's wrongful levy claim.

The government's argument that administrative concerns weigh against the application of equitable tolling lacks factual support. The government does not dispute the fact that wrongful levy claims average only about 3,500 a year, far less than the tens of millions of refund claims discussed in *Brockamp*. Pet. 24. The administrative havoc that this Court found would result from the tolling of § 6511 would not result from tolling of § 6532(c), and the government does not argue to the contrary.

Rather, the government argues that a blanket ban on equitable tolling of § 6532(c) is needed to avoid possible prejudice to its ability to collect taxes. This argument fails in at least three respects. First, equitable tolling, as its name indicates, requires consideration of the equities on a case-by-case basis. Where a wrongful levy and the claimant's inability to bring its claim within the limitations period arise largely from the government's own inequitable conduct, as here, the fact that tolling might impair its ability to collect a tax on the proceeds of criminal conduct, to the victim's detriment, is not worthy of significant consideration. Under these circumstances, the injustice to the Petitioner far outweighs any prejudice the government may sustain if § 6532(c) is equitably tolled. While prejudice to the

government may be a factor to be considered in a particular case, a rule barring equitable tolling in all cases as a matter of law is not warranted. *Cf. Supermail Cargo,* 68 F.3d at 1208 ("Whether the government would be prejudiced by a tolling of the limitations period is a question we have no way of answering at this stage of the proceeding").

Second, equitable tolling here would not prejudice the government. The government's brief states that the reason for § 6532(c)'s "short" limitations period is the government's "need to know whether it must look to other assets to collect a tax". Opp. 9. The government would not be prejudiced by equitable tolling in this case because it is undisputed (a) that the government (specifically, the IRS) knew or should have known from the outset that the proceeds of Wolckenhauer's pension would be needed for restitution purposes and (b) Wolckenhauer did not (and does not) have any other significant assets to which the government (or Petitioner) could look.

Third, the law is clear that equitable tolling requires unique circumstances, such as those presented here. *See Robinson v. Dalton,* 107 F.3d 1018, 1022 (3d Cir. 1997) (equitable tolling is proper where extraordinary circumstances prevent a party from asserting its rights). It is unlikely that the government will sustain widespread prejudice if this Court allows § 6532(c) to be equitably tolled under the circumstances presented. Properly applied, equitable tolling will have limited application.

The mere fact that § 6532(c)'s limitations period is nine months does not mean that it cannot be equitably tolled. This Court and other courts have consistently permitted equitable tolling of other "short" limitations periods. *See, e.g., Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982) (ninety-

day period to sue under Civil Rights Act of 1964 can be tolled); *N.C. Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 104 F. Supp. 2d 599 (M.D.N.C. 2000) (thirty-day time limit under 28 U.S.C. § 2412(d)(1)(B) can be equitably tolled).

Finally, the government's statement that this appeal presents a "hypothetical" question, based upon language from the District Court's opinion, is inaccurate. Opp. 4. The government's brief overlooks the following statement from the Third Circuit's opinion:

> Were we, however, to reach that question [the merits of Petitioner's argument], Judges Roth and Barry believe that a strong argument could be made that in the unique circumstances of this case, *i.e.*, where Wolckenhauer's tax liability arose solely as a result of the fraud he perpetrated on [Petitioner] and where the government levied on his pension and retirement benefits held by [Petitioner], thus depriving [Petitioner] – the victim — of restitution, [Petitioner's] restitution interest is superior to the government's tax liability interest.

Becton Dickinson v. Wolckenhauer, 215 F.3d 340, 341 n.2 (3d Cir. 2000).

Not only is the issue presented here not "hypothetical", but it is likely that, should this matter be remanded to the Third Circuit, Petitioner will succeed on the underlying merits of its claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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